

FILED

United States Court of Appeals  
Tenth Circuit

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

September 18, 2012

Elisabeth A. Shumaker  
Clerk of Court

In re:

ALEJANDRO ESPINOZA,

Petitioner.

No. 12-2135  
(D.C. Nos. 1:08-CV-00479-RB-WDS &  
2:04-CR-00852-RB-1)  
(D. N.M.)

ORDER

Before **GORSUCH**, **EBEL**, and **HOLMES**, Circuit Judges.

In this mandamus proceeding, pro se petitioner Alejandro Espinoza seeks an order directing the district court to consider and decide his pending 28 U.S.C. § 2255 motion in the United States District Court for the District of New Mexico, Case No. 1:08-cv-00479, as well as his other related motions that are pending in that proceeding. He filed his writ on August 27, 2012, and a motion to amend his petition on September 13, 2012. Mr. Espinoza also moves for leave to proceed without prepaying the filing fee and costs. We deny his petition and related motions.

The district court initially denied Mr. Espinoza's § 2255 motion in 2009. On appeal, this court remanded the matter in December 2010, instructing the district court to rule on Mr. Espinoza's *Brady*<sup>1</sup> claim. *See United States v. Espinoza*, 421 F. App'x 817, 819 (10th Cir. 2010), *cert. denied*, 132 S. Ct. 161 (2011).

<sup>1</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

Following remand, Mr. Espinoza filed a Fed. R. Civ. P. 60(b) motion, a motion to amend his Rule 60(b) motion and an amended Rule 60(b) motion. The government filed its omnibus response relating to the *Brady* claim and Mr. Espinoza's then-pending motions in April 2012. Thereafter, Mr. Espinoza filed a motion for summary judgment (in May 2012); a motion for an extension of time to file a reply (in May 2012); a motion for leave to amend and supplement his § 2255 motion (in May 2012); a motion for expedited consideration of his summary judgment motion (in July 2012); and a motion to enter a default judgment against the United States (in August 2012).

On August 29, 2012, shortly after Mr. Espinoza filed this petition, the magistrate judge issued a report and recommendation on the merits of the unresolved § 2255 *Brady* claim. On August 30, 2012, the district court denied Mr. Espinoza's Rule 60(b) motions; his motion to amend and supplement his § 2255 motion; and his motion for leave to conduct discovery, and granted his motion for extension of time to file a reply. On September 4, it denied his motion for summary judgment (and the related motion for expedited consideration of that motion) and his motion for default judgment.

“[A] writ of mandamus is a drastic remedy, and is to be invoked only in extraordinary circumstances.” *In re Cooper Tire & Rubber Co.*, 568 F.3d 1180, 1186 (10th Cir. 2009) (internal quotation marks omitted). “[W]e will grant a writ only when the district court has acted wholly without jurisdiction or so clearly abused its

discretion as to constitute usurpation of power.” *Id.* (internal quotation marks omitted). “Three conditions must be met before a writ of mandamus may issue”: (1) that the party “have no other adequate means to attain the relief he desires”; (2) that the party’s “right to the writ is clear and indisputable”; and (3) that the court “be satisfied that the writ is appropriate under the circumstances.” *Id.* at 1187 (internal quotation marks omitted).


A writ of mandamus may be appropriate where there has been inordinate and unreasonable delay by the federal district court in deciding a habeas corpus matter. *See Johnson v. Rogers*, 917 F.2d 1283, 1283-85 (10th Cir. 1990) (granting mandamus and holding federal district court’s fourteen-month delay in rendering a decision on a 28 U.S.C. § 2241 petition was impermissible under the circumstances presented). But there has there been no such delay in Mr. Espinoza’s case. The district court’s docket sheet demonstrates that this § 2255 matter is proceeding apace. The district court has now ruled on all of Mr. Espinoza’s pending motions, save the § 2255 motion, which is now awaiting Mr. Espinoza’s reply to the government’s response brief and his objections to the magistrate judge’s report and recommendation. We find no basis for Mr. Espinoza’s request to invoke the drastic and extraordinary remedy of mandamus.

On September 13, Mr. Espinoza filed a motion to amend his petition for writ of mandamus. In it, he acknowledges the district court has now ruled on his pending Rule 60(b) motions, but argues he is entitled to mandamus relief because the district

court's ruling was in error. Mr. Espinoza has an adequate means to attain the relief he desires, however, by filing an appeal from the court's ruling. A writ of mandamus is not a substitute for an appeal. *In re Cooper Tire*, 568 F.3d at 1186.

We DENY the petition for writ of mandamus. We DENY the motion to amend that petition, and we DENY the motion to proceed in forma pauperis.

Entered for the Court

A handwritten signature in cursive script, reading "Elisabeth A. Shumaker", written in dark ink on a light background.

ELISABETH A. SHUMAKER, Clerk